Supreme Court, U.S.
FILED

932044 APR 18 1994

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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*

SHERMAN L. SHAW,

Petitioner,

v.

FRANK W. MASTERS, ET AL

Respondents,

Petition for Writ of Certiorari to the United States Supreme Court

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PETITIONER FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should a District Court and Appeals Court ignore relevant case law in ruling on the state of the law on grounds of an immunity defense and the eleventh Amendment? Hafer v Melo, 498 U.S. 1118(1991), overuled Will v Michigan Dept. of State Police, 491 U.S. 58 (1989).

2. Does not a plaintiff have a right to discovery in medical Malpractice case where he was injured during surgery when he was unconscious and under anesthesia? Pagano v Orville Hospital, 145 FRD 683 Health Care Quality Improvement Act # 42 U.S.C.A. # 11101. (HCQIA).

3. Does Concealment of the injury toll the Statute? Bailey v Glover (1875) 115 US 21 Wall 342, 22 L. Ed 636; Pavlak v. Church C,A, IDAHO 1984, 727 F 2d 1425;.. K.S.A. 60-513; Holmberg v. Armbrecht,327 U.S. 392, 396-397, 66 S Ct 582, 90 L Ed 743 (1946)

PARTIES TO THE PROCEEDING

The parties to this action in the United States Court of Appeals for the Tenth Circuit were Frank W. Masters, David W. Robinson, Gene Arthur Budig, John C. Mcfadden, members of the Univ. of Kansas medical Center; Fred Allenbrand,

POINTS RELIED UPON IN THE RECORD

1. Document-12 Masters, Robinson, Budig, and Mcfadden specifically deny that any type of foreig object or other device was ever implanted into the plaintiff's left thigh of shaw or any other object was incerted into the plaintiff(This statement by respondents was pointed out in my.... reply brief on appeal, but ignored.

2. A moving party is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact.... exists. Maughan v S.W, Servicing Inc. 758 F 2d 1381, 1387 (10th Circuit 1985). An issue of fact is material only when the dispute is over facts that might affect the outcome under the governing law.... Anderson v Liberty Lobby Inc, 447 U.S.242, 106 S Ct 2505, 2509-10 91 L Ed 2d (1986).

2. In respondemts appellee brief some...

unknown person implanted the devices since i discovered that during my... surgery the operation was extended to tampering with my brain by concealing a radio receiver allegedly... inside my brain and turned on while the above case was on appeal. as the court stated in foil, 601 2d at . 148, it would be imprudent to adopt a rule that might attempt some health care providers to fail to advice patients of mistakes that have been made and even to make efforts to suppress..... knowledge of such mistakes in the hope that the running of the statute of limitations would make a valid cause of action nonactionable ...the law should foster a fulfillment of a duty to disclose so that proper remidial measures can be taken and damages ameliorated. quoted in S.W._____ Servicing, 758 F 2d 1181.

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In the

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Sherman L. SHaw,

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit will not be reported according to the tenth,_____, Circuit Court of Appeals. 16 F 3d 417.

Petitioner will reproduce the decision as it was issued by the Appeals Court.

*

JURISDICTION

The decision of the Tenth Circuit was entered on Feb. 7-1994. Petitioner did not file a timely Petition for rehearing which he knew would not have been granted since a timely motion to amend judgment had been entered on on 7-8/93 and denied. Appeal court's order and judgment was entered on February-7/1994

Mandate issued March 1, 1994, and the petition for writ of certiorari____ was timely filed and returned with instrutions to file the petition and Appendix together. This Court has jurisdiction over this matter pursuant to 28 U.S.C. # 1254(1).

*

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides in pertinent part: Congress shall make no " law" Abridging these liberties, which includes freedom of speech, assembly, association and freedom of press, and freedom of religion

The Constitutional right of free expression is intended to remove governmental restriant from arena of public discussion puttin decision as to what views shall be voiced largely into the hands of each of us in the belief that no other approach would comport with premise of individual dignity and choice upon which our political system rests, U.S.C.A. Const. Amend. 1., Simon & Schuster v N.Y. Crime Victims Bd. Cite as 112 S Ct 501 (1991)

Title 42 United States Code, # 1983, providrs in pertinent part:

Every person who, under color of any statute,ordinance, regulation, custom or usage, of any state subjects or... causes to be subjected, any citizen.. of the United States to the deprivations of any rights, priveleges, or... immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding.. for redress.

Section 1 of the Fourteenth Amendment to the United States Constitution provides.. in pertinent part: (N)or shall any state deprive any person of life, liberty, or property, without due orocess of law;nor deny to any person within its jurisdiction ion the equal protection of the laws."

Uhder this provision implements section 42 United States Code,# 1983 for grantin relief under the statutes and the Constitution.

The Fourth Amendment to the United States provides in pertinent part:

The rights of the people to be free in in their persons, houses, papers and effects agains unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath of information, particularly describing the place to be searched and the persons or things to be siezed.

The general principle is that the first amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. Members of City Counsel____, v Taxpayers for Vincent, 466 U.S. 789, 804 (1984) Emphasis Added.

Title 42 United States Code # 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state subjects or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Qualified immunity acts safeguard government and thereby protect public at large not to benefit its agents, Waytt v Cole, U.S. Miss. (1992)

eavesdropping devices were concealled within my body parts. one in my left thigh, back side just 4 or 5 inches... from where the knee bends, and i have discovered they had also invaded into my head, allegedly to implant a radio receiver inside my brain which was.... activated after defendant's were given summary judgment on a built in defense based upon their own selfserving statements in which the immunity defense was nothing but a sham defense. there was no injury to the upper parts of my body nor no noticeable damage to my head.

The burden of proving immunity is upon the one claiming the immunity exists.... Gomez v Toledo, 1980, 446 U.S. 635, 100 S Ct 1920 64 L Ed 2d 572.

HEALTH CARE QUALITY IMPROVEMENT ACT

The HCQIA is set forth as Chapter 117 of the Public Health and Welfare Code, Entitled "Encouraging good faith professional Review Activities." It is based , inter alia, on Congressional findings that___A nationwide medical malpractice problem can be remedied through concerted professional peer review activities aimed at__ restrict(ing) the ability of incompetent physicians to move from state to state." 42 U.S.C.A. #11101.

The bill protects innocent and often helpless cusumers from abuses by bad doctors without insulating improper anticompetive behavior from Redress.' (H.R. Rep. No. 903, 99th Cong. Reprinted in 1986 U.U. Code Cong & Admin. News 6287, 6386)

In light of Congress' efforts to prevent the bill from being used to hide Anti__ trust violations, this limited privilege

should be applicable where the plaintiff is alleging precisely that public harm., While this might encourage the filing of antitrust suits to obtain such information, Congress presumably has weight the costs and benefit of the litigation that it has enacted.

These provisions are consistant with the Supreme Court's determination that the act exempts only limited aspects of medical peer review activities from antitrust liability.

The Health care quality improvement act of 1986 simply serves to create a national repository for information about a physician's past performance. see Mantle v Vanbolden 133 FRD 497 (1991) A hospital may requiest information regarding a certain doctor as it proceeds through the hiring process.

Under the (HCQIA) plaintiff alleging Medical Malpractice on him performed

during surgery is entitled to discovery of who performed the surg ery on him in which his bodily integrity and his mental facilities including his brain is being violated. requested information__ is not available from other sources, and relevant truthful information are individ ual right of litigant as well as significant public interest; (HCQIA), HEALTH CARE QUALITY IMPROVEMENT ACT. Pagano Oroville Hospital, 145 FRD 683.

There is no federal statutory basis for medical peer review privilege or selfcritical analysis privilege at least in settings where peer review or self-analysis themselves are under attack,

In federal question cases the clear weight of authority and logic supports reference to federal law on the issue of the existence and scope of an asserted privilege. Kerr v U.S. Dist. Court for northern Dist. of California, 511 F 2d 192, 197 (9th Cir 1975), Aff'd 426 U.S. 394, 96 S Ct 2119,

48 L Ed 2d 725 (1976) . Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Oppenheimer Fund, Inc. V Sanders, 437 U.S. 340, 351, 98 S Ct 2380, 2389, 57 L Ed 2d 253___ (1978).

The party asserting an evidentiary privilege has the burden to demonstrate that the privilege applies to the information in____ question." Torney v United States, 840 F 2d 1424, 1426. (9th Cir. 1988).

The physician-patient privilege is not recognized by federal common law, statute _ or the constitution. The Supreme Court has____ flatly stated that "(t)he physician-patient evidentiary priviledge is unknown to the___ common law. (Citations.)" Whalen v Roe,429 U.S. 589, 602, n 28, 97 S Ct 869, 877 n 28, 51 L Ed 2d 64 (1977).

The Ninth Circuit, while noting "that the Hippocratic tradition of physician non-disclosure of patient secrets is ancient," In

re Grand Jury Proceedings (Doe), 801 F 2d 1164, 1169 (9th Cir. 1986). When asked to develop such a rule in deference to, and as a matter of comity with California's statutory physician-patient privilege, the Ninth Circuit declined, even though it recognized "that Congress intended that the courts have flexibility to develop rules on privileged communications on a case by case basis when it enacted Fed R. Evid 501." In re Grand Jury Proceedings, 867 F 2d at 564.

In the wiretap context or bugging context the burden is always upon the defendant to establish that his conduct was justified under the circumstances and upon him to bear the burden of showing public policy requires an exemption of that scope., Butz 438 U.S. at 506, 98 S Ct at 2920.

The trial of non-jury issues may not be used to collaterally estop on fact " Issues " triable of right to a jury_ in the same case. Printers II, Inc. v. Professional Publishing, Inc. C.A. 2d. 1986, 784 F 2d 141, 147.

On certiorari, the United States.... Supreme Court vacated the judgment of, the Court of Appeals, vacated the decision of the district court with respect to the worker's Title VII claims, and remanded the case for further proceedings in an opinion by Marshal, J., expressing the unanimous view of the Court, it was held that upon assuming for the purposes of decision that the worker had no right to a jury trial on his title VII claims and upon declining to address the question.....

whether the worker's # 1981 claims, stated a cause of action-(1) the combination, in the same action, of the district court's erroneous dismissal of the worker's legal claims under # 1981, followed by the district court rulings adverse to the worker's equitable claims under title VII, did not collaterally estop the worker from relitigating the same Title VII issues before a jury in the context of the worker's # 1981 claims,because to hold otherwise would seriously undermine the worker's Seventh Amendment right to trial by jury for (a) it was undisputed that, absent dismissal the worker would have been entitled to a jury trial ***on the # 1981 claims, (b) had the # 1981___ claims remained in the suit, the ___JURY would have been required to resolve ____ those claims before the court considererred the Title VII claims (c) the worker

was required to join his legal and equitable claims to avoid the bar of res judicata, (d) the lack of a collateral estoppel bar was consistent with the Supreme Court's approach in cases involving a wrongful denial of a right to jury trial on legal issues, and (e) the purposes served by collateral estoppel did not justify applying the doctrine in the case at hand; (2) even though the company contended that the Court of Appeals judgment ought to be affirmed on the ground that the district court would have directed a verdict against the worker on his # 1981 claims, under Rule 50(a) of the Federal Rules, even if those claims had been litigated before a jury, (a) the District Court's Rule 41(b) dismissal of the worker's Title VII discriminatory discharge claim did not necessarily mean that the district court would have granted a directed verdict

Supreme Court in Hafer v Melo,__U.S.__112 S Ct 358, 116 L Ed 2d 301 (1991), and do not require furthe discusion by this court., Munir v Scott 792 F Supp 1492 at A. page 1474. Hafer v Melo quoted.

The burden of proving the immunity is upon the one claiming the immunity exists

Rather than defining nature of eleventh amendment immunity, case law under which suits seeking prospective relief may be brought against state officials in federal court challenging constitutionality of official conduct enforcing state law renders eleventh amendment wholly___ inapplicable to certain class of suits___ deamed to be against officials and not___ states or their agencies, which retain their immunity against all suits in federal court. U.S.C.A. Const Amend 11. Pueeto Rico Aqueduck and Sewer Authority v Metcalf & Eddy, Inc 113 S Ct Reporter 684___ (1993).

*

STATEMENT OF THE CASE

The Tenth Circuit Court of Appeals has closed tht doors of the court on me which would prevent me from obtain- any redress for an injury that cannot be justified in law, done without pro- bable cause except for purposes ...of entrapment. as to Mr Gene Budig i have discovered that he possessed a dual... role at the relevant time which has a lot to do with how the injury was ac- complished which means that there could be no immunity for such conduct by...an executive officer in such dual positions at the relevant time. by closing the way to the truth in this injury, has proved that the purpose of this conduct was to allow the intended acts of entrapment to have a full run unhindered in which the injury continues

REASON FOR GRANTING THE WRIR OF REVIEW

The tenth Circuit has decided a case in conflict with the decisions of... this court and other circuits on the same... matter in more than one issue in this case. In the courts' decision i an .... listed as a defendant. I am not and.... have never been a defendant.

The Tenth Circuit has effectively ..... closed the doors of the courts on me and in so doing converted this conduct into a permanent injury without any or no no.... justification or redress.

CONCLUSION

By inappropiately applying the wrong.... standard and excepting an immunity defense which is solely within possession of those with much to hide does not establish right to judgment as a matter of law. review by this court is necessary to restore these... rights. Petitioner respectfully urges this

Court to grant this petition for Writ of certiorari.

DATED: June 14, 1994

Respectfully Submitted.

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Pro Se Petitioner

APENDIX-A

A-1

NOT PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHERMAN L. SHAW, Plaintiff-Appellant, v FRANK W. MASTERS, Professor Plastic Surgery et al Defendants-Appellees	Case No 93-3289 D,C, NO. 92-2519-GTV

Appeal from United States District Court of Kansas
G.T. Van Bebber, District Judge, Presiding

Submitted October 14, 1993
Clerk's Stamp
October 15, 1993...

No argument permitted

Filed Feburary 7, 1993

Before; SEYMOUR, Ghief Judge, McKAY, and BALDOCK, Circuit Judges
opinion by Judge SEYMOUR

SUMMARY

Civil Litigation and Procedure/Jurisdiction

The court of appeals affirme a judgment of the district court. the court held there was no abuse of discretion in the case even though discovery had been suspended pending the determination of an absolute immunity defense which was never established by the defendants, where only affirmative defenses were presented for the purpose of hindering and preventing discovery of relevant truthful information. The District Court granted summary judgment on an incomplete record in which had not been allowed to proceed. This case can be ruled upon without this court disturbing any relevant case law because it has been followed by other courts following the Supreme Court's direction on the state of the law on the same subject.

The District Court dismissed this case relying upon a case in state court which was overruled by the Supreme Court's later ruling in 1991. Hafer v Melo 498 U.S 1118, 1991 overruled Will v Michigan Department of State Police, 491 U.S. 58 (1989). will was a case in state court and do not apply to this case nor is the eleventh amendment involved.

In the brief filed by counsel he used or cited both Hafer v Melo and also Will v Michigan, which is a contridiction being inopposite to each other.

Since the appeals Court used the same standard as the district court and having already called the above case Hafer v Melo to the attention of the district court in doc 33 on the state of the law and in also the appeals court in my appeals brief and it not being considered, my only course is to seek a writ of certiorari.

No relevant discovery has taken place and according to document 24 could not go forward until defenses of immunity should preliminarily determined and the discovery subject was mentioned in one context which it was suggested that they provide a case on immunity of state defendants. Will was the case cited, and the 11th Amendment.

Since summary Judgment was granted on affirmative defenses and no transcript was made, no good faith defense was presented.

According to document 22 which allowed or required discovery to be completed, in which it was incomplete and the immunity defense claimed is yet to be determined.

Discovery was to be completed within four months. In this case the relevant and important issues of the state of the law & the foundation upon which it stands would be seriously compromised having no clear guide, and wouid promote uncertainty on a clea view of the state of the law and how it is applied leading to a double standard

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COUNSEL

SHERMAN L. SHAW Pro Se, for myself as, the Plaintiff- Appellant, Kansas city, Missouri 64109.

OPINION

SEYMOUR, Circuit Judge:

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a);... 10th Cir R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant Sherman L. Shaw brought a pro se civil rights action against defendants Frank W. Masters, David W. Robinson & Gene Author Budig, John C. Mcfadden, & Fred Allenbrand claiming they deprived him of ..

his constitutional rights in violation of 42 U.S.C.A. ## 42 U.S.C.A. 1983 and 1985. The district court granted defendents' motion for summary judgment... Rec., vol. II, doc. 38._____defendant then filed a motion to amend the judgment. Rec., vol. II, doc. 40. The district court treated Mr. Shaw's motion for reconsideration and overruled it for lack of merit. Rec., vol. II___ doc 50. We affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata-collateral estoppel. The court generally disfavors citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General order filed November 22, 1993.

Mr. Shaw was transported to the University of Kansas Medical Center (KUMC) in November 1989 to receive treatment___ for severe burns he sustained as the result a fire. While at KUMC, Mr. Shaw underwent Surgery and skin grafts on his legs and thighs. He alleges that on December 12, 1989, while in surgery at KUMC, defendants or their agents surreptitiously implanted an electronic surveillance device in his thigh for the purpose of monitoring__ his conversations and movements. he also allegesthat:defendant Allenbrand,_____the Sheriff of johnson county, Kansas ____has used the bugging device in his thigh to monitor him, and has sent heliocopters & agents into Kansas City, Missouri,_____to pursue and harass him.

In its memorandum and order, the district court considered both the facts of

this case and the applicable law and granted defendants' request for summary judgment. We affirm substantially on the basis of the district court's decision. in addition we review the district court's denial of Mr. Shaw's motion to amend for abuse, of discretion. See Ketchum v. Cruz, 961 F. 2d 916, 920 (10th Cir. 1992),

The district court specifically.. moted that, after reviewing Mr. Shaw's motion, "it articulates nothing warranting reconsideration of the court's reconsideration of the court's previous Memorandum and Order." Rec., supp. vol. I, doc. 50 at 1. Because we find no abuse of discretion ... we affirm.

Finnaly, in an apparent attempt to continue this suit despite the district court's decision below, Mr. Shaw has filed before this court additional pro

se motions seeking to drop defendant Allenbrand from the suit and to join Robert Stephan, the Attorney General for the state of Kansas, as well as four individual members of the Kansas Surgery Association, and the insurance carrier of the Kansas Surgery Association. Mr. Shaw had ample opportunity to bring such motions before the district court. Indeed, in his motion to amend, Mr. Shaw requested the substitution of certain parties, but the district court overruled Mr. Shaw's motion as meritless. It is improper to add parties on appeal and Mr. Shaw's motion is therefore denied.

The decision below is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Chief Judge

SUPREME COURT, U.S.
FILED
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(2)

No 93-2044

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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SHERMAN L. SHAW,

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Supplemental petition for Writ ofCertiorari to the United States Supreme Court

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SUPPLEMENT TO PETITION FOR CERTIORARI

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46 pp

SUPREME COURT RULE ON RIGHT TO TRIAL BY JURY

The Supreme Court has set the Rules on right to a jury trial on fact issues and non-jury issues where jury issues and non-jury issues are involved in the same suit

In Lytle v. Household Manufacturing, Inc., dba Schwitzer Turbochargers, 494 U.S. 545, 108 L Ed 2d 504, 110 S Ct 1331 Supreme Court settled the issue in the above listed case in which it vacated the decision of the District Court with respect to the worker's Title VII claims, and remanded the case for further proceedings.

In an opinion by Marsha ., J., expressing the unanimous view of the court, it was held that-upon assuming for the purposes of decision that the worker had no right to jury____ Trial on his Title Vii claims, and upon declinig to address the question whether the worker's #1981 claims stated a cause of action -(1) the combination, in the same action, of the District Court rulings adverse to the worker's equitable claims under Title VII

did not collaterally estop the worker from relitigating the same Title VII issues before a jury in the context of the worker's # 1981 claims, because to hold otherwise would seriously undermine the worker's Seventh Amendment trial by jury in order to afford the worker complete and consistent relief.

We are currently in the throes of another national hysteria which surrounded the alien and sedition acts, the palmer raids and the McCarthy era (which i remember very well). Those who petition their government for redress or register dessent are subjected to scrutiny by grand juries, by the FBI, or even the military, the Air Force which includes the military, (The Air Force in my case along with the FBI.

Their associates are interrogated. Their homes are bugged.(my body and brain is bugged) which includes every word i speak and every time i use the phone or talk to anyone my conversations are intercepted,

PARTIES TO THE PROCEEDING

The parties to this action in the United States Court of Appeals for the Tenth Circuit were Frank W. Masters, David W. Robinson, Gene Arthur Budig, John C. Mcfadden, members of the Univ. of Kansas medical Center; Fred Allenbrand,

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Anderson v Creighton, U.S. Minn 1987, 107 S Ct 3034, 483 U.S. 635, 97 Ed 2d 523..... G

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STATEMENT OF THE CASE ..... R-U

MOTION TO AMEND JUDGMENT DENIED...A/1 & B/1

No. 93-2044

In the

SUPREME COURT OF THE UNITED STATES

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Respondents.

Supplemental Brief and District Court decision as issued and filed in record

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

The decision of the United States Districk Court was Filed on June 29, 1993,. and motion to amend judgment was denied and Order Filed on August 12, 1993 and is reported in this supplemental brief.

A

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JURISDICTION

Jurisdiction in the U.S. District Court was conferred bt 28 U.S.C.A. # 1332. 28 U.S.C.A. # 1343, and Federal Question Jurisdiction 28 U.S.C.A. # 1331. petitioner filed a timely motion to amend judgment on 7/8/ 1993 which was denied on 8/ 12/ 1993.

The denial of the motion is also included in this supplement and reproduced as Entered and reported verbatum. Appeal court's order was reproduced in the brief and petition prepared and sent to the clerk of the supreme court, and this supplemental brief includes the opinions and orders issued by the District Court in the case.

This Court acquired Jurisdiction over this matter pursuant to 28 U.S.C.A. # 1254(1).

B

State hospital's rule requiring seclusion of all involuntary patients for seven in ten days, did not provide doctors who... followed it with qualified immunity from civil rights suit particularly where rule violated clearly established law in state at time seclusion occurred. Walters v Western State Hospital, C.A. 10 (Okla) 1988, 864 F 2d 695.

When there are federal law claims in a case also presenting State law claims, the federal rule favoring admissibility, rather than any state law privilege is the controlling rule. Foil nat'l Bank, 84 FRD 345(N.A. Ill 1979)

There are many omissions left out in the opinion of the district court which are relevant to these injuries. for example hidden titles of Gene Arthur Budig in his dual roles are not even mentioned; also dual roles of john C McFadden are not even mentioned which he used as an immunity shield,

C

LIMITATIONS OF ACTIONS IN MEDICAL MALPRACTICE

In medical malpractice actions, claim accrues when claimant discovers, or in exercise of reasonable diligence should have discovered alleged malpractice.__, #28 U.S.C.A. #2401(b)., Casias v United States 532 F 2d 1339 (1976) Same principal, State or Federal. Under the accrual rule a claim does not accrue until a claimant has had a reasonable opportunity to discover all the essential elements of a possible cause of action for malpractice, i.e.,___ Damages, Duty, Breach, and Causation.,____ Zeidler v U.S. 601 F 2d 527.

The dual positions occupied by Gene Arthur Budig and John C McFadden are not even listed in the district court's decision and opinion.

Masters and Robinson are also listed as having authority in the Kansas Surgery Association as professors and members in a loose knit partnership for sharing losts and profits.

The mere fact that the summary judgment movant supported the motion with a substantial memorandum, affidavits, and a lengthy appendix of deposition excerpts did not mean that the movant carried its initial burden of proving that no genuine issue of material fact existed, when the depositions along contained disputed crucial issues sufficient to require resolution at trial. Stephanischen v Mechants Dispatch Transp. Corp. C.A. 1st 1983, 722 F 2d 922.

I consider the assult upon my body to be one of the most represensible injurys that any human could commit against another and then claim immunity.

The guarantees of liberty which are____ among the rights possessed by every individual in a civilized society, are not privileges extended to the people by the legislature. It was the very ineffectiveness of state remedies that led congress to enact the civil rights act in the first place.

Congress therefore intended that the remedy provided in 1983 be independently enforceable whether or not it duplicated a parallel state remedy. , Monroe v Pape 365 U.S. at 173.

In expunding upon the principal of reasonableness adumbrated in osborn v. United States, 385 U.S., at 327, 329, Mr Justice Clark writing for the majority, reiterated the new approach; The indiscriminate use of such (bugging) devices in law enforcement raises grave constitutional questions under the fourth and fifth amendments,' and imposes a heavier responsibility on this Court in its supervision of the fairness procedures...'" 388 U.S. 323, 329 n. 7.

A motion for summary judgment lies only when there is no genuine issue of material fact. Summary judgment is not a substitute for the trial of disputed fact issues....., Madison v Deseret Livestock Co. C.A. 10th, 1978 574 F 2d 1027.

Accordingly, the Court cannot try issues of fact on a rule 56 motion but only is empowered to determine whether there are issues to be tried. , Finley v. Union Pacific R.R. Co. D.C. Kansas 1946, 6 FRD 248.

Summary Judgment is authorized only where moving party is entitled to judgment as a matter of law, where it is ___ clear what the truth is, and where no general issue remains for trial.

Bad faith or improper purpose is ordinarily sufficient to destroy a privilege of immunity. When federal Constitutional tort is involved the objective reasonable person standard seems to have been adopted so that the immunity is lost if there is a Constitutional violation and a reasonable person would have recognized this., Harlow v Fitzgerald 1982, 457 U.S. 800, 102 S Ct 2727, 73 L Ed 2d 396.

G

Qualified immunity strikes a balance between compensating those who had been injured by official conduct and protecting government's ability to perform its traditional functions, in short, qualified immunity acts to safeguard government, and thereby protect public at large, not to benefit its agents., Wyatt v Cole, U.S. Miss 1992, 112 S Ct 1827.

Generally, government officials performing discretionary functions have qualified immunity, sheilding them from civil damages liability as long as actions could reasonably have been thought consistent with rights they are alleged to have violated., Anderson v Creighton, U.S. Minn. 1987, 107 S Ct 3034, 483 U.S. 635, 97 L Ed 2d 523

As a general matter, decisional changes in the legal climate can be clear and sharp, or obscure and marginal; They can emanate from the highest Courts or the lowest.

Preclusion is most readily defeated by specific Supreme Court overruling of___ precedent relied upon in reaching the first decision. #4425 note 38.

There is a profound difference between secrecy and concealment.(both are involved here).

Where state and federal questions would be tried together "(O)bviously applying two seperate disclosure rules with respect to different claims tried to the same jury would be unworkable." A choice between disclosure and nondisclosure is unavoidable, whereas both federal and state interests might be recognized later in the case.. , Accord Lewis v Capital Mfg. Indust., 78 FRD 295 (D MD 1978)

When there are federal law claims in a case also presenting State law claims , the federal rule favoring admissibility, rather than any state law privilege is the controlling rule. " Foil v Nat'l Bank, 84 FRD 345 (N.D. Ill 1979)

I

Trial cannot be solely on affidavits., Dolence v Flynn, C.A. Wyo 1980, 628 F 2d 1280.

The principal basis for striking down state statutes allowing, or for restricting the permissible scope of wiretaps... and electronic eavesdropping on conversations, is the fourth amendment to the constitution of the United States, which provides: " The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures , shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searchee, and the things or persons to be seized."

A wiretap of a conversation over a telephone or an electronic listening device__ which enables others to overhear oral____ statements which the speaker intends to

be private, constitutes a " search and seizure," of a " thing " under the amendment., Katz v United States 389 U.S. 347, 19 L Ed 2d 576, 88 S Ct 507. The fourth amendment protects people and not simply areas, against unreasonable searches and seizures, Katz v U.S. supra

When pro se Civil Rights plaintiff properly executed form complaint which called for declaration in conformity with federal statute requiring that affiant's declare under penality of perjury, statements of claim was transformed from " mere allegations " of pleading into specific facts " as in evidentiary affidavit and therefore plaintiff's failure to proffer evidentiary materials directly in opposition to defendants motion for summary judgment without more did not mandate entry of summary judgment in favor of defendants. Rule 56 Macht Ed Wis 1991, 763 F Supp 1458 CF.

In the record John C McFadden identified himself as a special assistant attorney general of his own accord. An assult and battery is not a quasi-judicial actwhich was committed upon my body and my brain.

It has been said that a genuine issue is one that can be maintained by substantial evidence., Agosta v Immigration & Naturalization Service, 1978, 98 S Ct 2081, 2095, 436 U.S. 748, 56 L Ed 2d 677.

A tort growing out of malpractice is not to be barred by the statute of limitations when the delay in commencing the suit resulted from blameless ignorance, an approach that originated under the federal employers' liability act. Urie v Thompson 327 U.S. 103, 169-170, 69 S Ct 1018, 93 L Ed 1282(1949)

In Exnicious v U.S. 563 F 2d 418, 420 (10th Cir 1977) the injury occured in 1959 by performing surgery before a serious streptococcal infection was cured. The suit however, was not filed until 1972. Doctors had told plaintiff that his condition was

caused by arthritis. The explanation did not suggest any malpractice. the plaintiff claimed that a number of years had passed before he discovered that his condition was caused by necrosis stemming from surgery while there was an infection. summary judgment for the government was not proper because there were material fact issues remaining concerning when the plaintiff had a reasonable opportunity to discover all the elements of a possible malpractice action.

The fundamental question in this case is when the claim accrued so that the time for filing started to run. in medical malpractice actions the claim accrues " when " the claimant discovers , or in the exercise of reasonable diligence should have discovered the alleged malpractice. In the summer of 1993 after this case was granted summary judgment there was activated within my brain an electronic radio receiver which woke me up in the wee hours of the morning with my whole head

and ears blasting like a giant microphone. or speaker. Roger N. Bise ran or was aided in obtaining employment out of state, now his superior Gene Arthur Budig is also leaving his position and i want to take his deposition if at all possible before or even after he leaves.

For what reason was there a tampering with my mental facalities, which is far beyond the range of any little sheriff, since by this act i have become the target of every law enforcement organization throughout the known civilized world and possibly beyond.,

In 1933 thereabouts, a tyrant known as Adolph Hitler rose to world Tyrant through such tyranical and criminal acts of misconduct in nazi germany , and this type of conduct against private citizens was all political because of outwardly expressed opinions of criticism by me personally.

Factual issues subject to proof can not be determined on a motion for summary judgment , and must be reversed. CF. Wolsters v Prudential Insurance-- company of America 296 F 2d 140 (8th cir 1961).

42 U.S.C.A. # 1983 Statute was enacted to aid in "thepreservation of human__ liberty and human rights; " Owen v City of Independence 445 U.S. 622, 636 (1980). Quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger) REflects a congressional judgment that a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees," 445 U.S. at 651. as remedial legislation, 1983 is to be construed generously to further its primary purpose. See 445 U.S. 636.

Findings of immunity have thus been " Predicated upon a considered inquiry into

the immunity historically accorded the relevant official at common law and the interests behind it," Imbler v Pachtman, 424 U.S. 409, 421 (1976).

Supreme Court decisions make clear as to whether such immunity has been established depends on facts pecularly within the knowledge and control of the Defendant or Defendants. The Supreme Court stated that "(I)t is the existence of reasonable grounds for the belief formed at the time and in light of the circumstances coupled with good faith belief that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." Scheuer v Rhodes, 416 U.S. at 247, 248

Petitioner requested among other things a jury trial on all issues triable by jury.

Trial of non jury issues may not be used to collaterally estop party on fact issues as to which it is entitled to a jury deter-

mination. Judgment 644 at 5, Printers II Inc. v Professionals Pub., Inc. Cite as 784 F 2d 141 (2nd Cir. 1986)

If the papers in the record raise a question of credibility concerning defendant's actions, that issue must be resolved at a trial and summary judgment is precluded, Sartor v Arkansas Natural gas corp, 1944, 64 S Ct 724, 321 U.S. 620, 88 L Ed 967.

The claimed privilege of respondents cannot be grounded in the common law under federal Rule of evidence 501. Univ of Penn v EEOC 493 U.S. 182.

To be clearly established right must be sufficiently clear that reasonable official claiming qualified immunity would understand that actions violated that right..,_, Civil Rights 214(2) at 6.; Sawyer v County of Creek et al and Rodrigo Ramirez, M.D. Individually and as an Employee of the state 908 F 2d 664.

Has it been and was it demonstrated that the law was clearly established which

the defendant or defendants violated?

Can it be said that the respondents did not know that this conduct violated clearly established law and is not entitled to qualified immunity?

CONCLUSION

Tolling period on wiretapping is governed by Federal law as is also Medical Malpratice which is also governedby federal law.

These guarantees of liberty are among the rights possessed by every individual in a civilized society, and are not privileges extended by the legislature.

It was the very ineffectiveness of state remedies that led congress to erect the civil rights act in the first place.

DATED: July 1, 1994

Respectly Submitted.

SHERMAN L. SHAW
2017 Linwood Blvd. Apt #404
Kansas City, Mo 64108
Phone (816) 921-3241
Pro Se petitioner

STATEMENT OF THE CASE

On 11-17-1989 late on a friday i was injured in a fire and explosion when a van i owned caught on fire through an explosion and flaming 190% achohol spewed on my cloths when the can exploded. i was transported to the university of Kansas medical center at the emergency entrance to Truman Medical Center who did not admit me but called to se if a bed was available at the Univ. of Kansas Medical Center and instructed mast Ambulance to continue over to the Univ. of Kansas Medical Center where they were waiting. I was admiited short-after dust dark, i was hurting so bad until i cannot remember the exact time. on 12/12-1989 around 9 A.M.on a Tuesday Surgery was performed on my legs and thighs through skin graft. I woke up around I:OO P.M.after the surgery. I was discharged as an outpatient on New YEARS Day and wore special garments called leotards for little over a yea and took pain medicine until it began to cause me kidney pain. my dressings were changed

and wounds cleaned once a week at first into the month of march on a regular basis. in January somewhere around the 22, or 23rd of january after i quit wearing the special garments, i wrote a letter to my assigned doctor informing him that i felt something inside my left thigh that did not belong and informing him of what i believed its purpose was from the activity around me by individuals and law enforcement.

He allegedly turned the letter over to the one who had Authority over him which Allegedly the Chancellor other officials which includes John C McFadden who informed me the letter was sent to the Insurance carrier for the Kansas surgery association.

Later John C. McFadden Announces that he is a special Assistant attorney general when i wrote to him informing him that the claim sent to the insuranc carrier had been rejected. he states the position of the_____

Center. we believe your treatment was appropriate. i could have gotten as good a treatment under a totolitarian regime. the hospital billed my insurance for $ 50,000 and the Kansas surgery association billed my insurance for $ 6000 dollars for services in which they violated my bodily integrity and my mental facilities through a denial of due process of law and a denial of equal protection of law.

The District Court has said in substance by its ruling that defendants were justified and that i should pay their legal fees for bugging my body and my brain, in which the court acted as both judge and jury in trying issues of fact. besides that the court refused to recognize relevant case law issued by the highest court in the land. defendants never addressed the issues except to assure me there was noting in my body or body parts by specifically denying the facts.

I am very well acquainted with my own body

And also my other members of my body including my head and brain.

In the Appeals Court some unknown person slipped by security into the operating room during surgery where a team of surgeons known as the Kansas surgery___ association were performing surgeries & secretly implanted these devices without being seen. I can just immagine the____ Cameras inserted in through my ears and nose or mouth in planting this electronic bug inside my brain to say nothing about butching my thigh to implant whatever is inside the plastic allegedly sealed pouch.

What could the darn good reason for this type of an assult on a burn patient while he was unconscious?

What could be the reason for commiting assults and batteries on a hospital patient

While the Sheriff says none of the hospitals are connected with Johnson County, I must disagree with that statement.

No where in the record did i say that Fred Allenbran performed any surgery

He allegedly does not have a degree in medecine or surgery and those inferences were made by the court, not me. however there has been widespread illegal wire-tapping and bugging in This area of the country, most of it illegal and unauth-orized and unreported to any branch of the federal or state government and i am possibly the only one who can point to those responsible in this case which could open a can of worms that would... never be closed by this corrupt conspir-atorial illegal injury which threatens the constitutional and statutory rights of all living today and those yet to be born.

Respectfully Submitted

SHERMAN L. SHAW
2017 Linwood Blvd
Apartment 404
Kansas City, Mo 64109-2019

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

SHERMAN L. SHAW

V.

FRANK W. MASTERS,
DAVID W. ROBINSON,
GENE ARTHUR BUDIG,
FRED ALLENBRAND, and
JOHN C. McFADDEN.

JUDGMENT IN A CIVIL CASE

CASE NUMBER
92-2519-GTV

(X) Decision by Court. This action came to decision before the Court. The issues have been considered and a decision has been___ rendered.

IT IS ORDERED AND ADJUDGED Pursuant to Memorandum and order filed June 28, 1993 and entered on the docket june 29, 1993;

Plaintiff SHERMAN L. SHAW is to take nothing, the action is dismissed on the merits. Defendants FRANK MASTERS, DAVID ROBINSON, GENE BUDIG, FRED ALLENBRAND, and JOHN C. MCFADDEN are to recover of plaintiff SHERMAN L. SHAW their costs of action.

ENTERED ON THE DOCKET: 06-29-1993 (Doc-39)

FILED JUN 29 1993
RALPH L. DeLOACH, Clerk

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF KANSAS

SHERMAN L. SHAW, Plaintiff,	CIVIL ACTION No. 92-2519-GTV
vs.	ENTERED ON THE DOCKET DATE: 6/29/1993
FRANK W. MASTERS, et al., Defendants	

MEMORANDUM AND ORDER

Plaintiff Sherman L. Shaw, appearing pro se, brought this action against defendants Frank W. Masters, David W. Robinson, Gene A. Budig, John C. McFadden, and Fred Allenbrand, alleging that they deprived him of constitutional rights in violation of the civil rights act of 1871, 42 U.S.C. ## 1983 and 1985. The case is before the court on the following motions:

(Doc. 20) - The motion of defendant Allenbrand for summary judgment pursuant to Fed. R Civ. P. 56(b); (Document-38)

(Doc 29) - The motions of defendants Budig and McFadden for summary judgment pursuant to Fed. R. Civ. P. 56(b) and for sanctions pursuant to Fed. R. Civ. P. 11;

(Doc. 31) - The motions of defendants masters and Robinson for summary judgment pursuant to Fed. R. Civ. P. 56(b) and for sanctions pursuant to Fed. R. Civ. P. 11.

Plaintiff has responded and opposes defendants' motions (Doc. 28 and 33). For the reasons stated below, the motions for sanctions are overruled.

SUMMARY JUDGMENT STANDARDS

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be discharged by "showing," that is, pointing out to the district court, that there is an absence of evidence to support the nonmoving party's case. Celotex corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, "a party opposing...may not rest on mere allegations or denials of his pleading, must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id.

BACKGROUND

Before setting out the uncontroverted facts in this case, the court will summarize plaintiff's allegations. Plaintiff alleges that in november, 1989, he sustained burns to his legs(he ommitted the 3rd degree burns to also my thighs) for which he was transported to the University of Kansas Medical Center (KUMC). He alleges that on december 12, 1989, while in surgery at KUMC, defendants, or their agents, surreptitiously implanted an electronic surveillance device in his left thigh. He also alleges that heliocopters and agents of Allenbrand, the sheriff of johnson county, Kansas, are using the " bug" to pursue and harass him.

Based on those allegations, plaintiff claims defendants deprived him, of various constitutional rights. He now sues defendants Masters, Robinson, Budig, and McFadden in their official and "personal" capacities

as agents of KUMC, and defendant Allenbrand, the Sheriff of Johnson County, Kansas. To remedy the allegee civil rights violations, plaintiff seeks $ 10,000,000 in compensatory damages and $ 30,000,000 in punitive damages.

In their motions for summary judgment, defendants have set forth statements of material fact that they offer to the court as uncontroverted. those statements of fact are supported by affidavits that are attached to their motions.

Those facts are offered to show that defendants took none of the actions alleged by plaintiff oan that defendants did not deprive plaintiff of any constitutional rights. Plaintiff, in his opposition and supplemental opposition to the motions, has failed to controvert any of the material facts defendants offer as uncontroverted.

Therefore, pursuant to Fed. R. CIV. P. 56(c) and D. Kan. Rule 206(c), the court deems the following facts admitted:

Plaintiff is a long time resident of Kansas City, Missouri. Defendants Masters and Robinson are Medical Doctors who are, or were, professors at KUMC. Defendant Robinson retired from the practice of medicine in 1985, four years before plaintiff was treated at KUMC. Defendant Budig is the Chancellor of the university of Kansas.

Defendant McFadden is an attorney who represents KUMC. None of these defendants were involved in the treatment of plaintiff at KUMC in December, 1989.

Defendant Allenbrand, as stated above is the Sheriff of Johnson County, Kansas.

Neither he nor anyone in his office has ever had contact with plaintiff other than a letter written by plaintiff informing him of this action. The Johnson County Sheriff's Department does not presently maintain, nor

has it ever maintained, a heliocopter. Defendant Allenbrand was not involvee in the treatment plaintiff received at KUMC in December, 1989.

DISCUSSION

Defendants move the court for summary judgment on several grounds. in his motion, defendant Allenbrand contends that the uncontroverted facts disclose that he is entitled to judgment as a matter of law on plaintiff's claims. In their motions, defendants Masters, Robinson, Budig, and McFadden contend that the uncontroverted facts disclose that they are entitled to judgment as a matter of law: (1) They are immune under the Eleventh Amendment; (2) the Statute of limitations bars plaintiff's claims. The court will address defendants' motions seperately.

Allenbrand's Motion

Plaintiff alleges that defendant Allenbrand deprived him of constitutional rights

because defendant Allenbrand was involved in the placement of the "bug" in his thigh and because defendant Allenbrand and his deputies have used that "bug" to eavesdrop on his conversations and to keep track of his movements. Plaintiff also claims that defendant Allenbrand has sent heliocopters and an "army" into kansas city, Missouri, to pursue and harass him. The Court Concludes that defendant Allenbrand is entitled to summary judgment on these claims. The uncontroverted facts are that defendant Allenbrand and his agents have had no contact with plaintiff whatsoever. There is no evidence that defendant Allenbrand was involved in plaintiff's treatment at KUMC in December, 1989. There is no evidence that Allenbrand has sent heliocoptors or an "army" to pursue or harass plaintiff in missouri. in fact, defendant Allenbrand has no heliocoptors at his disposal.

Based on the uncontroverted facts, the court concludes that defendant allenbrand has not deprived plaintiff of any constitutional rights in violation of section 1983 or 1985. His motion for summary judgment is sustained.

Masters', Robinson's, Budig's, and McFadden's Motions

Plaintiff alleges these defendants, as employees of KUMC, deprived him of constitutional rights because they performed, oversaw, or attempted to conceal the surgical implantation or the surveillance device in his left thigh. Based on the uncontroverted facts of the case and the present state of the law as applied to those facts, the court concludes that these defendants are entitled to judgment as a matter of law on plaintiff's claims.

To the extent that they are sued in their official capacities as agents or employees the KUMC, which is a state agency, they are immune from suit under the Eleventh AMENDMENT.

See Will v. Michigan Dept. of State Police, 491 F 2d 58, 71 (1989); also Brennan v. University of Kansas, 451 F 2d 1287, 1290-91 (10th Cir. 1971). To the extent that they are sued in their personal capacities the uncontroverted evidence is that they were not involved directly or indirectly, in any actions taken for or against plaintiff in december, 1989, and are thus entitled to judgment as a matter of law on those claims. additionally, as these defendant note, the surgical procedure underlying this action occurred in December, 1989, more than two years proceeding the filing of this action. Therefore, plaintiff's claims are barred by the two year statute of limitations. See Garcia v Wilson, 471 U.S. 261 (1985).

Defendants Masters, Robinson, Budig, and McFadden are entitled to summary judgment on plaintiff's section 1983 and 1985 claims.

As a final matter, defendants have moved for sanctions, or in the alternative for an

order prohibiting plaintiff from instituting another action in this district for any alleged injuries arising out of the treatment he received at KUMC in December, 1989.

As sanctions, defendants seek to recover their attorneys' fees. The court denies the the motion for sanctions, However, if plaintiff files another action in this district regarding the events described in this complaint, the court will impose sanctions on plaintiff and order him to pay defendants' attorneys' fees.

IT IS, THEREFORE, BY THE COURT ORDERED that defendants' motions for summary judgment (Docs. 20, 29, and 31) are sustained. The case is hereby dismissed.

IT IS FURTHER ORDERED that defendants' motions for sanctions are overruled. However, if plaintiff files another action in this district regarding the events described in his complaint, the court will impose sanctions on plaintiff.

Copies of this memorandum and order shall be mailed to counsel of record for defendants and to plaintiff personally.

IT IS SO ORDERED,

Dated at Kansas City, Kansas, this 25th day of June, 1993.

G. T. VAN BEBBER
United States District Judge

A/1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SHERMAN L. SHAW,

Plaintiff,

vs.

FRANK W. MASTERS, et al.,

Defendants.

CIVIL ACTION
No. 92-2519-GTV

FILED U.S. DISTRICT COURT OF KANSAS
AUG 12

ORDER

Plaintiff Sherman L. Shaw, appearing pro se, brought this action against defendants Frank W. Masters, David W Robinson, Gene Arthur Budig, John C. McFadden, and Fred Allenbrand, alleging that they deprived him of constitutional rights in violation of the civil rights act of 1871, 42 U.S.C. ## 1983 and 198 . by Memorandum and order dated June 25, 1993 (Doc., 38), the court sustained defendants' motions for summary judgment and dismissed this action. Plaintiff has now filed a motion (Doc. 40) which the court will address as

a motion for reconsideration under D. Kan. Rule 206(f). The court has reviewed plaintiff's motion and finds that it articulates nothing warranting reconsideration of the court's previous Memorandum and order.

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiff's motion for reconsideration (Doc. 40) is overruled.

Copies of this order shall be mailed to counsel of record for defendants and to plaintiff personally.

DOC. 50

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 11 day of August, 1993.

G. T. VAN BEBBER
United States District Judge

Supreme Court, U.S.
FILED
JUL 20 1994
OFFICE OF THE CLERK

No. 93-2044

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SHERMAN L. SHAW,
Petitioner,

vs.

FRANK W. MASTERS, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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July 17, 1994

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court below properly sustained a motion for summary judgement?

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OPINIONS BELOW

Opinion of the District Court for the District of Kansas (Petitioner's Appendix A-1) is not reported, but is reported in entirety in Respondent's Brief in Opposition as Appendix A. The opinion of the Court of Appeals for the Tenth Circuit (Petitioner's Appendix A-5) is not reported, and is likewise appended in its entirety as Appendix B.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATEMENT OF FACTS

The facts of the case are stated fully in the decisions of the District Court (Respondents Appendix A) and the Court of Appeals (Respondents Appendix B).

REASONS TO DENY WRIT OF CERTIORARI

The respondents oppose the petition for writ of Certiorari on five grounds:

1. Petition for Writ of Certiorari Fails to State Sufficient Reason for Consideration and Review by this Court.

Supreme Court Rule 10 provides, "A petition for a Writ of Certiorari will only be granted when there are special and important reasons therefore." The petition states neither a valid federal question nor an important or special reason calling for the exercise of this Court's supervision. The decision below is consistent with prior opinions of this Court as well as other federal appellate courts. Moreover, Petitioner's questions fail to rise to the level of character of questions considered by this Court on a Writ of Certiorari.

The petition merely appears to reiterate unfounded and bizarre allegations summarily dismissed on their merits when Petitioner completely failed to produce any support or evidence to substantiate his claims.

2. Petition for Writ of Certiorari is not in Compliance with Rule 14.

Supreme Court Rule 14.5 provides that petitioner's failure to "present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Under Rule 14.1 (j), the

argument presented must be direct and concise. The petition is neither direct nor concise but appears to be argumentative and repetitious of the unsupported claims dismissed in the District Court of Kansas and the Tenth Circuit. The questions presented by petitioner are unclear to the point of being nonsensical. Aside from the complete lack of merit to these contentions, petitioner fails to argue with any clarity or accuracy which would lead to a "ready and adequate understanding of the points requiring consideration" as required by Rule 14.5.

Additionally, Respondent points out that petitioner fails to comply with various procedural requirements mandated in Rule 33.

3. The Decision Below is Reasonable.

The Tenth Circuit decision is soundly based on well settled principles of law. To recover in a civil rights action under 42 U.S.C. §1983, petitioner must do more than allege a constitutional right and then claim a violation by respondent. Hannula v. City of Lakewood, 907 F.2d 129, 132 (10th Cir. 1990). In order to overcome a motion for summary judgment based on qualified immunity in a §1983 action against a state official, Petitioner must offer more than conclusory and nonspecific allegations that the official violated clearly established law. Pride v. Does, 997 F.2d 712 (10th Cir. 1992); Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642 (10th Cir. 1988).

Petitioner must show substantial correlation between the conduct in question and prior law, establishing that Respondent's actions were clearly prohibited. Hovater v. Robinson, 1 F.3d 1063 (10th Cir. 1993).

Upon asserting peculiar conduct by the Sheriff,

Petitioner has been afforded every opportunity to provide supporting evidence of his claim. Petitioner refuses to come forth with any evidence, medical tests, or meaningful substantiation to support his allegations.

Respondent's statement of facts denies any contact with Petitioner and therefore no violation of Petitioner's constitutional rights. Where such statements remain uncontroverted, the court below correctly held that there was no genuine issue of material fact and summarily dismissed the claim on its merits. The Tenth Circuit Court of Appeals, under standards well established by this court, could reach no contrary result. Therefore, the decision below was reasonable and not clearly erroneous.

4. The Decision is Wholly Consistent with the Decisions of This Court.

This court has clearly established the well settled principle that summary judgment is proper where any essential element of Petitioner's case is without factual support. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L. Ed. 2d 256, 274 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L. Ed. 2d 538 (1986).

Where the doctrine of qualified immunity has been established, government officials are protected from civil liability when their conduct fails to violate clearly established constitutional or statutory right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Accordingly, Petitioner bears the burden of convincing the court that when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have

understood that his acts were unlawful. Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

Petitioner has been given more than ample opportunity to provide the district court with factual support to corroborate his claim. After repeated failure to show any genuine issue of material fact, summary dismissal is proper. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct 2505, 91 L. Ed. 2d 202.

Accordingly, the petition submitted does not merit review by this Court pursuant to Supreme Court Rule No. 10.

5. There is no Conflict Among the Circuits.

The decision of the Tenth Circuit Court of Appeals is in full accord with all other federal appellate courts.

The Fifth Circuit recently affirmed a decision holding that the burden is on the civil rights plaintiff to overcome the state actor's defense of qualified immunity. The court further stated that the plaintiff must show that the state actor's conduct was not objectively reasonable, but violated clearly established law, and plaintiff must plead specific facts with a level of particularity so they would, if proved, warrant the relief plaintiff seeks. Burns-Toole v. Byrne, 11 F.3d 1270 (5th Cir. 1994).

Where an inmate failed to refute affidavits indicating that a prison official was not responsible for direct or indirect medical treatment or lack thereof, the Sixth Circuit affirmed summary judgment in a §1983 action. Ritchie v. Wickstrom, 938 F.2d 689 (6th Cir. 1991) reh. and reh. en banc denied (Sept. 24, 1991).

The Seventh Circuit likewise approves of summary

judgment in favor of a government official claiming qualified immunity from civil rights liability where plaintiff fails to show evidence of his claim. The court held that summary judgment is warranted if the uncontested facts revealed that the official's acts do not invade the plaintiff's clearly established constitutional rights. Nelson v. Streeter, 16 F.3d 149 (7th Cir. 1994).

Where a prisoner provided no facts to support his claims of discrimination or conspiracy, the Eighth Circuit held that allegations of civil rights violations by prison officials did not preclude summary judgment. Bellecourt v. United States, 994 F.2d 427 (8th Cir. 1993), cert. denied 62 U.S.L.W. 3550 (1994).

The Eleventh Circuit has also held that a plaintiff in a §1983 action must show that the person acting under color of state law has deprived them of rights, privileges, or immunities secured by the Constitution or laws of the United States. Duke v. Smith 13 F.3rd 388 (1994).

Where the appellate courts are in agreement, Petitioner's questions presented do not merit review by this Court under Rule 10.

CONCLUSION

In consideration of Supreme Court Rule Nos. 10, 14, 33, and further reasons set forth above, the petition for certiorari should be denied.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR RESPONDENT
FRED ALLENBRAND

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SHERMAN L. SHAW,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	No. 92-2519-GTV
FRANK W. MASTERS, et al.,	)	
	)	ENTERED ON
Defendants.	)	THE DOCKET
	)	DATE: 6/29/93

MEMORANDUM AND ORDER

Plaintiff Sherman L. Shaw, appearing pro se, brought this action against defendants Frank W. Masters, David W. Robinson, Gene A. Budig, John C. McFadden, and Fred Allenbrand, alleging that they deprived him of constitutional rights in violation of the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1985. The case is before the court on the following motions:

(Doc. 20) - The motion of defendant Allenbrand for summary judgment pursuant to Fed.R.Civ.P. 56(b);

(Doc. 29) - The motions of defendants Budig and McFadden for summary judgment pursuant to Fed.R.Civ.P. 56(b) and for sanctions pursuant to Fed.R.Civ.P. 11; and

(Doc. 31) - The motions of defendants Masters and Robinson for summary judgment pursuant to Fed.R.Civ.P. 56(b) and for sanctions pursuant to Fed.R.Civ.P. 11.

Plaintiff has responded and opposes defendants' motions (Docs. 28 and 33). For the reasons stated below, the motions for summary judgment are sustained and the motions for sanctions are overruled.

SUMMARY JUDGMENT STANDARDS

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issues of material fact. This burden may be discharged by "showing," that is, pointing out to the district court, that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, "a party opposing . . . may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id.

BACKGROUND

Before setting out the uncontroverted facts in this

case, the court will summarize plaintiff's allegations. Plaintiff alleges that in November, 1989, he sustained burns to his legs for which he was transported to the University of Kansas Medical Center (KUMC). He alleges that on December 12, 1989, while in surgery at KUMC, defendants, or their agents, surreptitiously implanted an electronic surveillance device in his left thigh. He alleges that defendants "bugged" him in order to eavesdrop on his conversations and to keep track of his movements. He also alleges that helicopters and agents of defendant Allenbrand, the Sheriff of Johnson County, Kansas, are using the "bug" to pursue and harass him. Based on those allegations, plaintiff claims defendants deprived him, and conspired to deprive him, of various constitutional rights. He now sues defendants Masters, Robinson, Budig, and McFadden in their official and "personal" capacities as agents of KUMC, and defendant Allenbrand as the Sheriff of Johnson County, Kansas. To remedy the alleged civil rights violations, plaintiff seeks $10,000,000 in compensatory damages and $30,000,000 in punitive damages.

In their motions for summary judgment, defendants have set forth statements of material fact that they offer to the court as uncontroverted. Those statements of fact are supported by affidavits that are attached to their motions. Those facts are offered to show that defendants did not deprive plaintiff of any constitutional rights. Plaintiff, in his opposition and supplemental opposition to the motions, has failed to controvert any of the material facts defendants offer as uncontroverted. Therefore, pursuant to Fed.R.Civ.P. 56(c) and D.Kan. Rule 206(c), the court deems the following facts admitted:

Plaintiff is a long-time resident of Kansas City,

Missouri. Defendants Masters and Robinson are medical doctors who are, or were, professors at KUMC. Defendant Masters retired from the practice of medicine in July, 1989, four months before plaintiff was treated at KUMC. Defendant Robinson retired from the practice of medicine in 1985, four years before plaintiff was treated at KUMC. Defendant Budig is the Chancellor of the University of Kansas. Defendant McFadden is an attorney who represents KUMC. None of these defendants were involved in the treatment of plaintiff at KUMC in December, 1989.

Defendant Allenbrand, as stated above, is the Sheriff of Johnson County, Kansas. Neither he nor anyone in his office has ever had contact with plaintiff (other than a letter written by plaintiff informing him of this action). The Johnson County Sheriff's Department does not presently maintain, nor has it ever maintained, a helicopter. Defendant Allenbrand was not involved in the treatment plaintiff received at KUMC in December, 1989.

DISCUSSION

Defendants move the court for summary judgment on several grounds. In his motion, defendant Allenbrand contends that the uncontroverted facts disclose that he is entitled to judgment as a matter of law on plaintiff's claims. In their motions, defendants Masters, Robinson, Budig, and McFadden contend that the uncontroverted facts disclose that they are entitled to judgment as a matter of law because: (1) they are immune under the Eleventh Amendment; (2) they were not directly or indirectly involved in the surgical procedure underlying this action; and (3) the statute of limitations bars plaintiff's claims. The court will address defendants' motions separately.

Allenbrand's Motion

Plaintiff alleges that defendant Allenbrand deprived him of constitutional rights because defendant Allenbrand was involved in the placement of the "bug" in his thigh and because defendant Allenbrand and his deputies have used that "bug" to eavesdrop on his conversations and to keep track of his movements. Plaintiff also claims that defendant Allenbrand has sent helicopters and an "army" into Kansas City, Missouri, to pursue and harass him. The court concludes that defendant Allenbrand is entitled to summary judgment on these claims. The uncontroverted facts are that defendant Allenbrand and his agents have had no contact with plaintiff whatsoever. There is no evidence that defendant Allenbrand was involved in plaintiff's treatment at KUMC in December, 1989. There is no evidence that defendant Allenbrand has sent helicopters or an "army" to pursue or harass plaintiff in Missouri. In fact, defendant Allenbrand has no helicopters at his disposal. Based on the uncontroverted facts, the court concludes that defendant Allenbrand has not deprived plaintiff of any constitutional rights in violation of section 1983 or 1985. His motion for summary judgment is sustained.

Masters', Robinson's, Budig's, and McFadden's Motions

Plaintiff alleges these defendants, as employees of KUMC, deprived him of constitutional rights because they performed, oversaw, or attempted to conceal the surgical implantation of the surveillance device in his left thigh. Based on the uncontroverted facts of the case and the present state of the law as applied to those facts, the court concludes that these defendants are entitled to judgment as a matter of law on plaintiff's claims. To the extent that they

are sued in their official capacities as agents or employees the KUMC, which is a state agency, they are immune from suit under the Eleventh Amendment. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989); also Brennan v. University of Kansas, 451 F.2d 1287, 1290-91 (10th Cir. 1971). To the extent that they are sued in their personal capacities the uncontroverted evidence is that they were not involved directly or indirectly in any actions taken for or against plaintiff in December, 1989, and are thus entitled to judgment as a matter of law on those claims. Additionally, as these defendants note, the surgical procedure underlying this action occurred in December, 1989, more than two years preceding the filing of this action. Therefore, plaintiff's claims are barred by the two-year statute of limitations. See Garcia v. Wilson, 471 U.S. 261 (1985). Defendants Masters, Robinson, Budig, and McFadden are entitled to summary judgment on plaintiff's section 1983 and 1985 claims.

As a final matter, defendants have moved for sanctions, or in the alternative for an order prohibiting plaintiff from instituting another action in this district for any alleged injuries arising out of the treatment he received at KUMC in December, 1989. As sanctions, defendants seek to recover their attorneys' fees. The court denies the motion for sanctions. However, if plaintiff files another action in this district regarding the events described in his complaint, the court will impose sanctions on plaintiff and order him to pay defendants' attorneys' fees.

IT IS THEREFORE, BY THE COURT ORDERED that defendants' motions for summary judgment (Docs. 20, 29 and 31) are sustained. The case is hereby dismissed.

IT IS FURTHER ORDERED that defendants' motions for sanctions are overruled. However, if plaintiff files another action in this district regarding the events described in his complaint, the court will impose sanctions on plaintiff.

Copies of this Memorandum and Order shall be mailed to counsel of record for defendants and to plaintiff personally.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 25th day of June, 1993.

/s/_____
G.T. VAN BEBBER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SHERMAN L. SHAW,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 93-3289
	)	D.C. No. 92-2519-GTV
	)	(D. Kan.)
FRANK W. MASTERS, Clinical Professor; DAVID W. ROBINSON, Professor; GENE ARTHUR BUDIG; JOHN C. MCFADDEN, Associate General Counsel, as members of the University of Kansas Medical Center; FRED ALLENBRAND, Sheriff of Johnson County,	)	
	)	
Defendants-Appellees.	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT*

Before SEYMOUR, Chief Judge, McKAY, and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant Sherman Shaw brought a pro se civil rights action against defendants Frank W. Masters, David W. Robinson, Gene A. Budig, John C. McFadden, and Fred Allenbrand claiming they deprived him of his constitutional rights in violation of 42 U.S.C. § § 1983 and 1985. The district court granted defendants' motions for summary judgment. Rec. vol. II, doc. 38. Defendant then filed a motion to amend the judgment. Rec., vol. II, doc. 40. The

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 22, 1993.

district court treated Mr. Shaw's motion as a motion for reconsideration and overruled it for lack of merit. Rec., supp. vol. I, doc. 50. We affirm.

Mr. Shaw was transported to the University of Kansas Medical Center (KUMC) in November 1989 to receive treatment for severe burns he sustained as the result of a fire. While at KUMC, Mr. Shaw underwent surgery and skin grafts on his legs and thighs. He alleges that on December 12, 1989, while in surgery at KUMC, defendants or their agents surreptitiously implanted an electronic surveillance device in his thigh for the purpose of monitoring his conversations and movements. He also alleges that defendant Allenbrand, the sheriff of Johnson County, Kansas, has used the "bugging" device in his thigh to monitor him, and has sent helicopters and agents into Kansas City, Missouri, to pursue and harass him.

In its memorandum and order, the district court considered both the facts of this case and the applicable law and granted defendants' request for summary judgment. We affirm substantially on the basis of the district court's decision. In addition, we review the district court's denial of Mr. Shaw's motion to amend for abuse of discretion. See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992). The district court specifically noted that, after reviewing Mr. Shaw's motion, "it articulates nothing warranting reconsideration of the court's previous Memorandum and Order." Rec. supp. vol. I, doc. 50 at 1. Because we find no abuse of discretion, we affirm.

Finally, in an apparent attempt to continue this suit despite the district court's decision below, Mr. Shaw has filed before this court additional pro se motions seeking to

drop defendant Allenbrand from the suit and to join Robert Stephan, the Attorney General for the State of Kansas, as well as four individual members of the Kansas Surgery Association and the insurance carrier of the Kansas Surgery Association. Mr. Shaw had ample opportunity to bring such motions before the district court. Indeed, in his motion to amend, Mr. Shaw requested the substitution of certain parties, but the district court overruled Mr. Shaw's motion as meritless. It is improper to add parties on appeal and Mr. Shaw's motion is therefore denied.

The decision below is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Chief Judge

No. 93-2044

Supreme Court, U.S.
FILED
JUL 20 1994
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

SHERMAN L. SHAW,

Petitioner,

v.

FRANK W. MASTERS, DAVID W. ROBINSON, GENE ARTHUR BUDIG, JOHN C. McFADDEN, THE UNIVERSITY OF KANSAS MEDICAL CENTER, and FRED ALLENBRAND, as Sheriff of Johnson County,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
for the Tenth Circuit

BRIEF OF RESPONDENTS MASTERS, ROBINSON, BUDIG AND McFADDEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Are individual state employees immune under the Eleventh Amendment to the United States Constitution from actions under 42 U.S.C. § 1983 when they are sued in their official capacity and there is no evidence that they had any personal contact with the petitioner?

2. Is petitioner's claim barred by the statute of limitations?

PARTIES TO THE PROCEEDINGS

The parties are correctly shown in the caption to the case shown on the cover of this brief.

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BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinions below were unpublished. The opinion, entered on June 29, 1993, by the United States District Court for the District of Kansas was accurately reproduced in petitioner's Supplemental Petition except for the addition of hyphens and certain adjustments made by Shaw to paragraphs. These changes, however, do not materially alter the decision. The opinion of the 10th Circuit Court of Appeals is attached as Appendix A.

JURISDICTION

Jurisdiction in the district court was federal question jurisdiction. 28 U.S.C. § 1331. Jurisdiction before this court is pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usuage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding forredress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be

considered to be a statute of the District of Columbia.

K.S.A. 1993 Supp. 60-513(a):

> Actions limited to two years.
> (a) The following actions shall be brought within two years:
> . . .
> (4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

STATEMENT OF THE CASE

Petitioner Sherman L. Shaw has appeared pro se throughout this case. On November 17, 1989 Shaw suffered burns when his Dodge van caught fire and a gallon can of 190% alcohol "spewed" over his clothes and body. He was transported from the location of the fire in Kansas City, Missouri to the burn unit at the University of Kansas Medical Center in Kansas City, Kansas. On December 12, 1989 surgery was performed to graft skin onto Shaw's arms and legs.

Shaw contends, during the December 12, 1989 operation, an electronic device was

implanted in his leg. Shaw believes this device was implanted to permit someone or some agency to monitor his movements. In his Petition for a Writ of Certiorari, Shaw for the first time expands his complaint to contend he has also recently discovered a radio receiver implanted in his brain. (Petition for Writ of Certiorari, p. 6.)

Shaw filed his claim initially on December 12, 1991 in the United States District Court for the Western District of Missouri naming numerous defendants.[1] The action was brought under 42 U.S.C. § 1983 for deprivation of various constitutional rights. The defendants were sued "[I]n

---

[1]The named defendants included Gene Budig, the Chancellor of the University of Kansas, Roger N. Bise, D.D.S., M.D., Robert A. Boraz, D.D.S., Frank W. Masters, David W. Robinson, M.D., Mani M. Mani, M.D., Glen Potter, the Administrator of the University of Kansas Medical Center, Charles Norris, M.D., the Chief of Staff of the University of Kansas Medical Center, and Laurence Cheung, who plaintiff asserts was the chairman of the surgery department. Plaintiff also named the University of Kansas Medical Center as a defendant.

their personal capacity because of their authority." Plaintiff alleged each of the defendants "participated" in implanting a surveillance or bugging device in his left leg during his hospital stay at the University of Kansas Medical Center Burn Unit.

In dismissing plaintiff's cause of action, Judge Elmo B. Hunter, Senior U.S. District Judge, in an Order of April 13, 1992 found, pursuant to Fed. R. Civ. P. 12(b) and 42 U.S.C. § 1983, that plaintiff's Complaint failed to state a claim upon which relief could be granted. In a footnote, Judge Hunter also indicated the court's view that venue was improper and that a § 1983 action against state agencies brought in federal court was barred by the Eleventh Amendment to the United States Constitution. Shaw did not appeal Judge Hunter's decision.

On December 31, 1992, Shaw filed a new Complaint in the United States District Court for the District of Kansas alleging again that an electronic device was implanted in his leg. Frank W. Masters, M.D., David W. Robinson, M.D., and Gene Budig, Chancellor of the University of Kansas, were the only defendants named from the original list of defendants

previously named in the Missouri action. John C. McFadden, an Associate General Counsel for the University of Kansas Medical Center, was newly added, as was Fred Allenbrand, the Sheriff of Johnson County, Kansas, who Shaw alleged used the electronic device to monitor Shaw's actions with a helicopter.

On June 25, 1993, G.T. Van Bebber, United States District Judge, granted defendants' Motions for Summary Judgment based in part on uncontroverted facts contained in defendants' Motion for Summary Judgment supported by affidavits filed by defendants. (Memorandum and Order, 6-28-93 entered on the docket 6-29-93.) The Court held defendants (1) immune from suit under the Eleventh Amendment; (2) found defendants were not directly or indirectly involved in the surgical procedures underlying this action; and (3) that the statute of limitations barred plaintiff's claim. The district court did not specifically address Shaw's contention that the statute of limitation was tolled during a period the electronic device was concealed and that the statute did not begin to run until January of 1992 when he first discovered the electronic device in his leg.

Judge Van Bebber noted in his opinion that defendant Masters retired from the practice of medicine in July, 1989, four months before Shaw was treated at the University of Kansas Medical Center. Defendant Robinson retired in 1985, four years before Shaw was admitted to the University of Kansas Medical Center.

The Court found:

1. Defendants, to the extent they are sued in their official capacity as employees or agents of the University of Kansas Medical Center, were immune.

2. To the extent defendants were sued in a personal capacity, the uncontroverted evidence was that they had no involvement, either direct or indirect, in the actions taken for or against Shaw.

3. The action arose in December, 1989, and plaintiff's claim was barred by the two-year statute of limitation.

On July 8, 1993, plaintiff filed a Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). In his motion plaintiff attempted to substitute Frank Masters and David W. Robinson as defendants "in [their] individual

capacit[ies] for acts taken in [their] official capacit[ies]," and "to eliminate Defendant Fred Allenbrand as a defendant, and to substitute Roger N. Bise as a defendant instead of the sheriff." (Motion, 7-8-93, p. 1.) Plaintiff failed to file a memorandum in support of his motion as required by D. Kan. Rule 206(a) but on July 26, 1993 filed a pleading entitled "Answer." The "Answer" appears to be plaintiff's attempt to address the issues raised by his Motion to Alter or Amend Judgment.

On July 28, 1993, plaintiff filed a motion entitled "Motion, Inquiry, and Notice. Motion to Extend Time to File an Appeal Until the Motion Filed by Plaintiff in the Clerks office on July 8, 1993 Has Been Ruled on in Order that Plaintiff May Protect and Preserve Those Rights Secured and Guaranteed by the Constitution and Laws of the United States of America." The following day plaintiff filed a "Notice of Intent to File Notice of Appeal" and a "Notice of Appeal."

Plaintiff's Motions to Alter or Amend Judgment were overruled by Judge Van Bebber on August 12, 1993. On August 13, 1993 the district court issued a Minute Order denying as moot plaintiff's

Motion For an Extension of Time to File an Appeal.

On September 14, 1993, pursuant to the Notice of Jurisdictional Defect issued by the Office of the Clerk, defendants served their Memorandum Brief addressing "whether this court has jurisdiction where the notice of appeal was filed while a timely served motion for reconsideration was pending before the district court." (Notice, 8-12-93, p. 4.)

In an Order dated October 18, 1993, the Court of Appeals dismissed plaintiff's appeal (Appeal No. 93-3239) for lack of jurisdiction.

Plaintiff filed a new Notice of Appeal on September 14, 1993. Again, plaintiff appealed from the court's Order granting summary judgment.

On March 3, 1994 the United States Court of Appeals for the Tenth Circuit issued its Order and Judgment without oral argument. In its decision the court held in favor of defendants on the merits and affirmed the district court's refusal to amend, finding no abuse of discretion. Shaw v. Masters, 16 F.3d 417, unpublished (1994). The court also denied plaintiff's

motion to add and substitute defendants finding such a motion on appeal improper.

On April 18, 1994 Shaw filed a Petition for Certiorari with this Court. By letter of May 2, 1994 the clerk returned the petition to Shaw because it did not comply with the Court's rules. Shaw refiled his Petition for Writ of Certiorari sometime prior to June 21, 1994, the date received by these defendants.

On July 11, 1994 these defendants were served with a "Supplement to Petition for Certiorari."

This brief addresses both the Petition and Supplemental Petition.

ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. A WRIT OF CERTIORARI IS UNNECESSARY WHEN NO NEW OR NOVEL ISSUE OF CONSTITUTIONAL OR FEDERAL LAW IS PRESENTED.

Plaintiff Shaw, who appears pro se, has discussed numerous issues and theories in his Petition and Supplemental Petition.

The thrust of his complaint has been that the lower courts found named employees of the University of the University of Kansas and the University of Kansas Medical Center immune under the Eleventh Amendment to the United States Constitution. Shaw cites Hafer v. Milo, 498 U.S. 1118 (1991) for the proposition that employees of an otherwise immune state agency may be sued individually. He is correct that state officials may be sued in their individual capacity, but ignores that to establish a claim the officials must have somehow participated in the conduct he alleges caused the injury.

In order to establish a claim under 42 U.S.C. § 1983, a plaintiff must plead sufficient facts to indicate the defendant or defendants actually participated in or had knowledge of, and acquiesced in, the event forming the basis of his or her claim. Egan v. Concini, 585 F. Supp. 801, 804 (M.C. Ga. 1984); Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir.), cert. denied, 469 U.S. 845 (1984) (must show supervisory official at least implicitly authorized, approved, or knowingly acquiesced in unconstitutional conduct). In his Complaint, petitioner merely alleged defendants failed to properly investigate his complaints about the

medical treatment he received at the University of Kansas Medical Center. (Complaint, 12-31-92, ¶ 45, ¶ 67.) Petitioner's allegation is not sufficient to create personal liability under § 1983.

Likewise, plaintiff cannot assert respondeat superior or vicarious liability as a basis for alleged constitutional deprivations under § 1983. Generally, respondeat superior or vicarious liability will not support a § 1983 claim. City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989).

In his Complaint, petitioner named defendants in their personal capacities "for their official acts of misconduct." (Complaint, 12-31-92, ¶ 1.)

Defendants Masters, Robinson, Budig and McFadden filed individual affidavits which were uncontroverted by any evidence from petitioner.

Masters and Robinson are both physicians who retired prior to the time Shaw was seen by the University of Kansas Medical Center. Budig was the University of Kansas Chancellor who had absolutely no knowledge of Shaw. McFadden is an Associate General Counsel for the

University of Kansas Medical Center whose contact with Shaw was to receive his original letter complaining of his treatment.

Petitioner's failure to sue these defendants for their personal conduct was not so much a pleading error by a pro se plaintiff as an allegation correctly stating the facts. These defendants could not and should not have been sued for their individual conduct. Masters and Robinson had absolutely no contact with Shaw. Budig was simply the Chancellor of the University of Kansas, one part of which is the University of Kansas Medical Center. McFadden was an attorney at the medical center who received Shaw's complaint.

These facts do not raise questions under either the U.S. Constitution or federal law.

II. THE PETITIONER'S ALLEGED CLAIM IS BARRED BY A TWO-YEAR STATUTE OF LIMITATION.

If immunity is found, the question regarding the statute of limitations is moot.

The statute of limitations in § 1983 actions is governed by state law. Board of Regents v. Tomanio, 446 U.S. 478, 484-85 (1980). Section 1983 claims are best characterized as personal injury actions. Wilson v. Garcia, 471 U.S. at 276; Garcia v. Wilson, 731 F.2d 640, 651 (10th Cir. 1984) aff'd, 471 U.S. 261 (1985). Accordingly, the two-year statute of limitations set forth in K.S.A. 60-513(1)(4) applies to petitioner's claim. Baker v. Kansas Board of Regents, 991 F.2d 628, 630 (1993).

Petitioner alleges the "foreign device" was placed in his leg during an operation performed on December 12, 1989. Petitioner newly asserts the claim that a radio transmitter was allegedly inserted into his brain, presumably during the operation in which he alleges the electronic device was implanted into his leg. Petitioner filed his Complaint on December 31, 1992, more than two years after his operation.

The lower court apparently rejected plaintiff's contention that the defendants concealed the electronic device, thereby tolling the statute of limitation.

CONCLUSION

Petitioner's claim, although bizarre, may very well be sincerely held by Shaw. He has not, however, brought an action that states a cause of action under 42 U.S.C. § 1983. There is no split of authority among U.S. circuit courts concerning either the immunity or statute of limitations issues, and neither present any unique issues regarding federal law. The lower courts correctly applied the law of this Court. Petitioner merely seeks to have his action reviewed by this Court. Such a review is unwarranted.

WHEREFORE, respondents pray that petitioner's Writ of Certiorari be denied.

Respectfully submitted,

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Counsel of Record

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APPENDIX A

Order and Judgment of the United States Court of Appeals, Tenth Circuit (February 7, 1994) 1a

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-3289
(D.C. No. 92-2519-GTV)
(D. Kan.)

SHERMAN L. SHAW,

Plaintiff-Appellant,

v.

FRANK W. MASTERS, Clinical Professor, et al.,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before SEYMOUR, Chief Judge, McKAY, and BALDOCK, Circuit Judges.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 22, 1993.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant Sherman Shaw brought a pro se civil rights action against defendants Frank W. Masters, David W. Robinson, Gene A. Budig, John C. McFadden, and Fred Allenbrand claiming they deprived him of his constitutional rights in violation of 42 U.S.C. §§ 1983 and 1985. The district court granted defendants' motion for summary judgment. Rec., vol. II, doc. 38. Defendant then filed a motion to amend the judgment. Rec., vol. II, doc. 40. The district court treated Mr. Shaw's motion as a motion for reconsideration and overruled it for lack of merit. Rec., supp. vol. I, doc. 50. We affirm.

Mr. Shaw was transported to the University of Kansas Medical Center (KUMC) in November 1989 to receive treatment for severe burns he sustained as the result of a fire. While at KUMC, Mr. Shaw underwent surgery and skin grafts on his legs and thighs. He alleges that on December 12, 1989, while in surgery at KUMC, defendants

or their agents surreptitiously implanted an electronic surveillance device in his thigh for the purpose of monitoring his conversations and movements. He also alleges that defendant Allenbrand, the sheriff of Johnson County, Kansas, has used the "bugging" device in his thigh to monitor him, and has sent helicopters and agents into Kansas City, Missouri, to pursue and harass him.

In its memorandum and order, the district court considered both the facts of this case and the applicable law and granted defendants' request for summary judgment. We affirm substantially on the basis of the district court's decision. In addition, we review the district court's denial of Mr. Shaw's motion to amend for abuse of discretion. See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992). The district court specifically noted that, after reviewing Mr. Shaw's motion, "it articulates nothing warranting reconsideration of the court's previous Memorandum and Order." Rec., supp. vol. I, doc. 50 at 1. Because we find no abuse of discretion, we affirm.

Finally, in an apparent attempt to continue this suit despite the district court's decision below, Mr. Shaw has filed before this court additional pro se

motions seeking to drop defendant Allenbrand from the suit and to join Robert Stephan, the Attorney General for the State of Kansas, as well as four individual members of the Kansas Surgery Association and the insurance carrier of the Kansas Surgery Association. Mr. Shaw had ample opportunity to bring such motions before the district court. Indeed, in his motion to amend, Mr. Shaw requested the substitution of certain parties, but the district court overruled Mr. Shaw's motion as meritless. It is improper to add parties on appeal and Mr. Shaw's motion is therefore denied.

The decision below is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Chief Judge

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
AUG 19 1994
OFFICE OF THE CLERK

No. 93-2044

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SHERMAN L. SHAW,
Petitioner,

vs.

FRANK W. MASTERS, et al,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OPPOSING A MOTION TO DISMISS

Sherman L. Shaw
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24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should a District Court and Appeals Court ignore relevant case law in ruling on the state of the law on grounds of an immunity defense and the eleventh Amendment? Hafer v Melo, 498 U.S. 1118(1991), overuled Will v Michigan Dept. of State Police, 491 U.S. 58 (1989).

2. Does not a plaintiff have a right__ to discovery in medical Malpractice case where he was injured during surgery when he was unconscious and under anesthesia? Pagano v Orville Hospital, 145 FRD 683__ Health Care Quality Improvement Act # 42 U.S.C.A. # 11101. (HCQIA).

3. Does Concealment of the injury toll the Statute? Bailey v Glover (1875) 115 US 21 Wall 342, 22 L. Ed 636; Pavlak v. Church C,A, IDAHO 1984, 727 F 2d 1425;.. K.S.A. 60-513; Holmberg v. Armbrecht,327 U.S. 392, 396-397, 66 S Ct 582, 90 L Ed 743 (1946); Kansas sta. KSA 60-513(c)

PARTIES TO THE PROCEEDING

The parties to this action in the United States Court of Appeals for the Tenth Circuit were Frank W. Masters, David W. Robinson, Gene Arthur Budig, John C. Mcfadden, members of the Univ. of Kansas medical Center; Fred Allenbrand,

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28 U.S.C.A. 1332

BRIEF OPPOSING MOTION TO DISMISS

RIGHT TO JURY TRIAL

Trial of nonjury issues may not be used to collaterally estop party on fact issues as to which it is entitled to a jury determination., Printers II, Inc., v Professionals Publishing, Inc., 784 F 2d 141 (2nd Cir. 1986).

The Supreme Court has set the rules on right to a jury trial on fact issues and non jury issues where jury issues are involved in the same suit., Lytle v Household Manufacturing, Inc,. dba Schwitzer Turbochargers, 494 U.S. 545, 108 L Ed 2d 504,110 S Ct 1331

Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Poller v. Columbia Broadcasting Sys., Inc., 1962, 82 S. Ct. 486, 491, 368 U.S. 464, 473,L Ed 2d 458.

BRIEF OPPOSING MOTION TO DISMISS (Continued)

Undue Limitation of Discovery

Although a District Court has considerable lattitude in determining the scope of discovery, it abuses its discretion when discovery is so limited as to effect a party's substantial rights. , Goldman v Checker Taxi Company, 325 F 2d 8 , 8 6 (7th Cir 1963); See Rôeling v Anderson 103 U.S. App. D,C. 237, 257 F 2d 615, 619 (1958)

Grants of summary judgment on incomplete records are generally disfavored, and this is particularly true where it is concluded that the District Court's discretion over the fact . finding process has been tainted by an erroneous view of the law.

Party from whom discovery is sought has burden of showing "good cause" for protective order. 768 F 2d 669, 684 (5th Cir) cert. denied 475 U.S. 1011, 106 S Ct 1186 L Ed 2d 302 (1986) Am. Benefit Life Inc Co. v. Ille 87 FRD 540, 543 (W.D. Okla 1978)

BRIEF OPPOSING MOTION TO DISMISS(Cont.)

To grant injunctive relief under the doctrine of Harlow v Fitzgerald., 457 U.S. 800.

To determine whether respondents here can point to some statute to privilege or immunity they claim and upon what statute is it based.

To allow petitioner to discover the names of the Doctors in attendance on day of his surgery who performed the surgery on him since under the (HCQIA), HEALTH CARE QUALITY IMPROVEME ACT known under statute 42 U.S.C.A. 11101-11111 et seq. does not establish such a broad privilege . There is no federal statutory basis for a medical peer review privilege Dowling v American Hawaii Cruises, Inc 971 F 2d 423 (9th cir 1992)

To establish a continued commitment to the bill of rights under the doctrine of Katz v v United States 389 U.S. 347 and U.S. v United States District Court.

STATUTE OF LIMITATIONS IN A CONSPIRACY

The statute of limitations in a conspiracy does not accrue until the conspiracy ran its course. This is a chain conspiracy which is characterized by different activities carried on with same subject of conspiracy in chain-like manner that each conspirator in chainlike manner performs a seperate function which is to serve in the accomplishment of the overall conspiracy.

Although a civil rights plaintiff asserted claims for false arrest and false imprisonment as well as malicious prosecution, all claims essentially related to alleged conspiracy to frame him for murder of police officer and statute of limitations did not accrue until conspiracy ran its course., Maruffi, C.A. 10th (n.m.) 1990, 895 F 2d 649.

Officials of the University of Kansas Med-center operating under an unconstitutional state statute in conspiracy with federal offic ers and federal officials set out to frame me by making possible an act for entrapment

Defendants knew that i would suffer a long duration of injury when they met and decided to commit the injury through concealment.

Statements of coconspirators are admissible against defendant, where from record, it is clear that defendant's own statements and acts demonstrates that he participated in conspiracy and that he engaged in affirmative steps to further conspiracy.

Defendants were entitled to summary judgment on qualified immunity grounds if they can establish as a matter of law that the search comported with the fourth amendment even though it actually did not., Harlow v Fitzgerald 457 U.S. 800: Anderson v Creighton et al no 85-1520 (argued Feb 23, 1987- decided june 25, 1987 (8th cir)

Affirmative proof is such proof or such evidence of the truth of matters asserted as tends to establish them regardless of the character of evidence offered. In respect to the question of summary judgment a fact is material if it constitutes a legal defense in the action.(not a sham pretense) Kenneth-Murray Corp v Bone Ca 1980, 622 F 2d 887.

The Supreme Court does not create an evidentiary privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence in as much as "(T)estimontal exclusiorary rules and privileges contravene the fundamental principal that the public has a right to every man's evidence'", And any such privilege must be strictly construed

"Moreover although rule 501 manifests a congressional desire "not to freeze the law of privilege but rather to provide the courts with flexibility to develope rules of privilege on a case by case basis, we are disinclined to exercise this authority expansively. " (citations). 493 U.S. at 189, 110 S Ct at 582. The court went on to note that congress considered but did not include a peer review privilege when it extended title VII to educational institutions. Id at 189-193, 110 S Ct at 582-584.

The ninth circuit subsequently declined to imbrace the analogous privilege of self-critical analysis." Dowling v American Hawaii Cruises, inc 971 F 2d 423 (9th cir 1992)

There is no federal statutory basis for a medical peer review privilege. The federal health care quality improvement act of 1986, 42 U.S.C.A. #11111 et seq. (hereafter "HCQIA", or the act") does not establish such broad based privilege.

It does accord antitrust liability immunity to medical "professional review" Participants whose actions conform to the standards of the act(id #11111) and protection against extraneous disclosure of confidential information thus generated (#11137(b)(1); However, these protections are based on the assumption that the underlying professional review actions were conducted "in the belief that the action was in the furtherance of quality health care" #11112(a). The integrity requirement is by the many exceptions to immunity set forth in #11111, including actions relating to civil rights

act of 1964, 42 U.S.C.A. #2000 et seq., and the civil rights acts, 42 U.S.C.A. #1981 et seq and the clayton act (15 U.S.C. #15c).

The act (HCQIA) infers support of disclosure when the very litigimacy of a medical peer review committee proceeding is at issue.

Without statutory authority executive officer may not erect privilege not to produce documents which will bar judicial scrutiny., Rosee v Board of (Trade) ___of Chicago, D.C. Ill 1964, 33 FRD 512;,

A document necessary, not absolutely privileged in possession of the defendant and requested by the plaintiff must be produced and made available as part of the administrative file insofar as it relates to the plaintiff himself but not to a stranger to the litigation., Weiss v U.S., 1967, 180 Ct Cl 863.

Chancellor's immunity qualified or not can not be claimed in a violation of my rights to procedural due process and equal protection of law.

INJUNCTIVE RELIEF

Petitioners' complaint may be contrued as seeking injunctive relief in addition to monetary damages. Defendants have had full notice and a full chance to respond to the things put in issue which constitutes a violation of the 1st, 4th, and 14th amendments under federal law, a violation of the Health Care Quality Improvement Act(HCQIA) #42 U.S.C.A.11101-11112., two assults upon my body(one upon my left thigh and one upon my brain, in violation of wiretap statutes and a violation of provisions of electronic surveillance provisions which violates the supramcy clause under the federal constitution.

Qualified immunity is unavailable for injunctive relief., Harlow v Fitzgerald,457 U.S. at 818, 102 S Ct at 2738.

This is an ongoing conspiracy made possible by defendant's setting a force in motion by commiting these injuries.

University Chancellor was not entitled to qualified immunity on #1983 Claim for termination of tentured professor in violation of his right to procedural due process since such action violates clearly established rights., Collins v Marina-Martinez C.A. 1 (Puerto Rico) 1990, 894 F 2d 474 CF. (This was an Official Act)

Physicians were not entitled to summary judgment in medical malpractice suit against them where there motions were supported by only their personal affidavits which stated simply that in their personal affidavits which stated simply that in their expert opinion neither of them was guilty of malpractice., Rienke v Oconner C.A. 11 (Ga), 1986 790 F 2d 850 rehearing denied 797 F 2d 982.

Attempts to frame and entrap a citizen to coverup wrongdoing by those who wear a badge of authority should not be tolorated by the courts,. Keith Jacobsor (Petitioner) v. U.S. 112 S Ct 1535(1992)

PURPOSE OF REQUIREMENT

Sole purpose of requirement of this rule that every judgment be set forth on a seperate document is to clarify when the time for appeal begins to run, Bankers Trust Co. v Mallis , N.Y. 1978, 98 S Ct 1117, 435 U.S. 381, 55 L Ed 357 rehearing denied, 98 S Ct 2259,416 U.S. 915, 56 L Ed 2d 416. see also, Ellison v Conoco, Inc C.A. 5(La) 1992, 95o F 2d 1196.

Purpose of this rule requiring that every judgment be set forth, is to protect an appellant from dismissal of his for untimeliness and where an application of this rule does not serve such purpose it is unnessary to afford them them appeal

This conduct was declared and ruled to be illegal in Katz v United States when it was ruled by the Supreme Court and i quote; We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the " Trespass " doctrine there enunciated can no be regarded as controlling. Katz v United States 389 U.S. 347.

Under Hafer v Melo, Official action is not protected by immunity, when that very official action has been established to be illegal., Katz v U.S. supra; Hafer 112 S Ct 358, 116 L Ed 2d 301 1991.

The Supreme Court has shown a long commitment to the bill of rights. In U.S. v. United States District Court it stated: We look to the bill of rights to safeguard this privacy. The broader spirit of fourth amendment now shields private speech from unreasonable surveillance.

In the appeals court some unknown person implanted a "foreign object" in his left thigh.

Statement of Facts

The University of Kansas has a team of doctors known as the Kansas Surgery association which lists seven doctors which are known as a partnership. on 1-13-1992 which counsel knows from the record, i sent the special process server to the University of Kansas Medical Center for the express purpose to learn who of the surgery department remained and to obtain the individual names of the members of the plastic surgery association. I told him to not to leave until he had obtained the necessary information. He spent the whole day until late in the afternoon from that morning, before he was finally able to contact any one. Finally he was directed to the plastic surgery department in which the administrator of the surgery department told

the special court appointed process server that she was authorized to receive service for the plastic surgery department because she was the administrator. Her name was Mary Gosney. I had told the process server to obtain a list of the members of the Drs as of the date of 1-13-1992. this is the the list that she wrote in her own hand-writing.

Plastic Surgery Department

for Dr Boraz-Mag 1/13/1992
Dr. Baker
Dr Robinson
Dr Mani
Dr Masters
Dr Hiebert

The record given at this time listed David W. Robinson as still at the medical center and still a member of the partnership.

Frank W. Masters was still listed as at the medical center and member of the partnership.

The only name missing was Roger N Bise, who was assigned as my docter and the letter in the record from Roger N. Bise dated 3-5-1990 listed Dr masters still at the medical center and a member of the partnership and also Dr Robinson was still there on 3-5-1990.

15

BURDEN OF PROOF

Burden of showing same issue was actually and necessarily determined in the prior action lies on the party asserting preclusion M. Conners v Tanoma Mining Co. C.A.D.C.1992 953 F 2d 682.

It was ruled, because the precise basis for decision was unclear, there was no preclusion.

Motion to dismiss could not be treated as motion for summary judgment where there had not been oral argument on issue and defendants had set forth no facts that would be admissible in evidence., Wolford v Budd Co., W.D. Va. 1993, 149 FRD 127.

There was no seperate document indicating a final judgment since there was nothing in issue but like of venue and jurisdiction.

RULE 58 Entry of judgment

District Courts should take care to enter a seperate judgment when they make a final disposition in a case. C.A. 8(mo)1988, 862 F 2d 161.

Local rule that requires entry of summary judgment simply if no papers opposing motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with summary judgment rule, and thus would violate federal rule that allows local rules only if they are " not inconsistant" with federal rules. Henry v Gill Industries, inc, C.A. 9 (Ariz) 1993, 983 F 2d 943 (28 U.S.C.A. 56 C.F.)

Burden of showing same issue was actually and necessarily determined in the prior action lies on the party asserting preclusion., M. Conners v Janoma Mining Co. C.A. D.C. (1992) 993 F 2d 682. It was ruled, because the precise basis of decision was unclear there was no preclusion.

Qualified immunity is affirmative defense, and burden of proving defense lies with official asserting it., Houghton v. Souyh, C.A. 9 (Mont) 1992, 965 F 2d 1532

Immunity from suit under #1983 is predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it," Imbler v Pachtman, 424 U.S. 409, 421, 96 S.Ct 984, 990, 47 L Ed 2d 547(1976).

Officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue, Burns v Reed, 500 U.S. 111 S Ct 1934, 114 L Ed 2d 547 (1991).

The Supreme Court has refused to extend absolute immunity beyond a very limited class of officials.

Where the evidence tends to connect a wrongdoer with the wrongful acts charged in the absence of any evidence explaining his conduct or any justification ever/ inference warranted by the evidence shall be taken against him., 86 C.J.S. Torts 59, page 983 note 82.

General rule in federal practice disfavors privileges not constitutionally based., WM. T. Thompson Co. v General Nutrition Corp. Cite as 671 F 2d 100 (1982).

IMMUNITY (continued)

Immunity available at common law will not be recognized if history or purpose or purpose of 1983 counsel against applying that in 1983 actions. Wyatt v. Cole U.S. Miss 1992, 112 S. Ct 1827

In determining whether immunity defense is available in 1983 suit, critical intial question is whether official claiming immunity can point to common law counterpart to privilege he asserts. Enlow v Tishomingo County, Miss., Ca. 5 (Miss) 1992, 962 F 2d 101

Common law immunities are not to be imported wholesale into this section., Briscoe v Lahue, C.D. Ill 1981, 663 F 2d 713, affirmed 103 S Ct 1108, 460 U.S. 325, 75 L. Ed 2d 96, certiorari denied 103 S Ct 1426, 460 U.S. 1037, 75 L Ed 2d 787

Because it detracts from 1983's broad remedial purpose, absolute immunity applies only to a limited class of officials and functions suc as prosecutors, executive officers iniating adminstartive proceedings,

TOLLING OF STATUTE, WIRETAPPING
ELECTRONIC SURVEILLANCE

Applying the due diligence standard to this case, no base for summary judgment in favor of appellees on statute of limitation grounds can be found. a wiretap is by nature secret, and extraordinary effects were undertaken to conceal the surveillance program involved. Such affirmative acts according to fitzgerald v Seamans, supra n 40, 180 U.S. App D.C. at 83; 553 F 2d 228 would provide the agravation needed to bring this case within the traditional view that the statute of limitations is tolled when there has been fraudulent concealment of the injury that would serve as the basis for legal action. See Holmberg v Armbrecht, 327 U.S. 392, 396-397, 66 S Ct 582, 90 L Ed 743 (1946).